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In the Supreme Court of the United States

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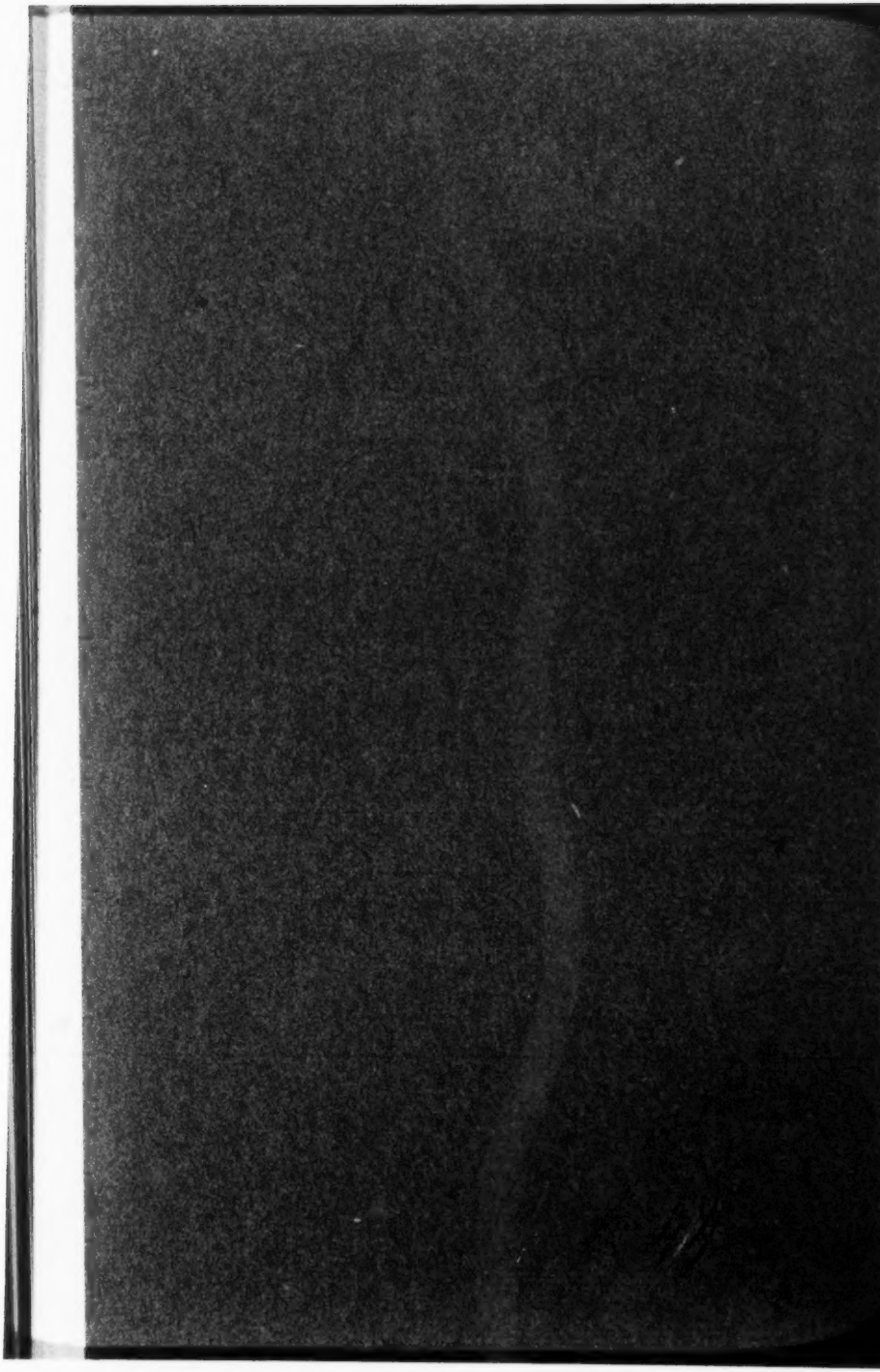

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 699

PEOPLES PACKING COMPANY, INC., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 68–78) is reported in 42 F. Supp. 868. The opinion of the Circuit Court of Appeals (R. 81–87) is reported in 132 F. (2d) 236.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 16, 1942 (R. 87). The petition for a writ of certiorari was filed on February 3, 1943. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

Petitioner owns and operates a plant at which it engages in the slaughter of cattle and hogs and the manufacture of beef and pork products. The plant contains a slaughtering department in which the inedible portions of the animal are removed and other related operations are performed by petitioner's employees. Only the inedible products move in interstate commerce. The questions are:

1. Whether the employees in the slaughtering department are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

2. Whether the slaughtering department is a "service establishment" within the meaning of Section 13 (a) (2) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, provide as follows:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (i) "Goods" means goods * * *, wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the

ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.

STATEMENT

Petitioner operates a plant in Oklahoma City, Oklahoma, where it slaughters cattle and hogs purchased in Oklahoma, and manufactures pork products (R. 20, 25, 64–65). Petitioner employs

approximately 40 persons.[1] From four to seven work in the slaughtering department and another is a night watchman for the entire plant (R. 48). All the employees in the slaughtering department kill and dress the animals and remove the inedible portions, including the hides of cattle (R. 20–22, 65). "The major portion of their manual efforts is exerted in the removal of the hides and the inedible portions from the carcasses" (R. 82).

Petitioner sells all of its meat products in Oklahoma for local consumption (R. 26, 29, 65), but practically all of the hides and offal are used in the manufacture of products which are shipped to other States. All of the offal, amounting to thousands of pounds each month (R. 51–52), is sold daily to the nearby Butcher Packing Company (R. 23, 28, 30) where it is converted into tankage and grease (R. 42–43). The Butcher Company ships large quantities of grease out of the State to Procter & Gamble Company, a soap manufacturer (R. 42–43), and also sells large quantities to the Cato Oil & Grease Company in Oklahoma City which uses grease to make lubricants, a major portion of which is shipped out of the State (R. 43, 45–46). Prior to February 1940, all of the offal was sold daily to the Oklahoma Rendering Company, located in Oklahoma City (R. 23), which shipped 80 percent of its tankage and 100 percent of its grease

[1] The District Court found that the petitioner employs from 30 to 40 persons (R. 65). The court below stated this number to be "approximately 45" (R. 82).

to purchasers outside the State (R. 40). Petitioner sells almost all of its hides daily in their original green condition to E. W. Gruendler & Company in Oklahoma City (R. 22–23, 27, 36, 53–64), which ships 90 to 95 percent of all hides purchased out of the State (R. 38–39). Petitioner had reasonable grounds to anticipate these interstate shipments (R. 77–78).

The hides and offal represent from 3 to 4 percent in value of the carcasses and about 45 percent in weight (R. 24, 28, 65). Petitioner's gross income from the sales of these inedible portions approximated $26,000 in 1939 and 1940, and totalled in excess of $19,000 during the first seven months of 1941 (R. 12, 17).

On June 20, 1941, the Administrator filed a complaint (R. 6–9) for an injunction under Section 17 of the Fair Labor Standards Act, alleging that petitioner was employing persons in the production of goods for interstate commerce without paying them the required overtime compensation for hours in excess of the statutory maximum workweek and was shipping, delivering, and selling such goods with knowledge that shipment, delivery, and sale thereof in interstate commerce was intended. The action was limited to employees performing services relating to the slaughtering operations (R. 31). The petitioner's answer (R. 9–10) denied that any of its employees were engaged in the production of goods for commerce.

The District Court denied an injunction on the ground that none of petitioner's employees was engaged in production for commerce and, in any event, that the employees were exempt from the provisions of the Act because they were engaged in a "service establishment" (R. 66–67). The Circuit Court of Appeals reversed the decree and remanded with instructions to grant the injunction, holding that "the employees in question were employed in handling the hides and offal and in an occupation necessary to the production of the tanned hides, fertilizers, lubricants, and soap" (R. 85), and that "the slaughtering department was not a service establishment" because "it was not selling or furnishing services to consumers" (R. 87).

ARGUMENT

The decision of the court below is correct and does not call for further review.

1. The services performed by the employees in the slaughtering department fall squarely within the statute's definition of production. Sections 3 (i) and 3 (j). The application of the Act depends upon the services performed by them without regard to those performed by other employees in petitioner's plant or the principal business of the petitioner. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.,* No. 336, present Term; *Overstreet* v. *North Shore Corp.,* No. 284, present Term. There can be no

question that the operations of the employees here involved are necessary to the production of hides, tankage, and grease which eventually move in interstate commerce. The fact that petitioner's immediate sales of the materials which comprise these products are all intrastate is of no consequence. It is settled that the Act extends at least to the production of goods which the employer "intends or expects to move in interstate commerce," *United States* v. *Darby,* 312 U. S. 100, 118, or with respect to which he has "a reasonable basis" for such expectation. *Warren-Bradshaw Drilling Co.* v. *Hall,* No. 21, present Term. Accordingly, those of petitioner's employees whose major efforts are exerted in the removal of the hides and inedible portions from the carcasses (R. 82) are engaged in the production of goods for commerce within the meaning of the Act.

The fact that only 3 to 4 percent by value or 45 percent by weight of petitioner's production move in interstate channels does not establish that this production is not substantial and important. The regulatory power of Congress under the commerce clause does not turn upon matters of percentages. *Santa Cruz Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467. Where the volume, as distinguished from the percentage, of commerce involved is "more than that to which courts would apply the maxim *de minimis*" (*National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 607), it is not material that a large percentage of peti-

tioner's products remain within the State. The court below recognized that if the Act applies to a small producer (*United States* v. *Darby, supra,* at 121, 123) "it must equally apply to the production for commerce of a small portion of the total production of a large producer" (R. 86). In fact, however, the value [2] of the products which move in interstate commerce is substantial in amount even though small in percentage, and the efforts of the employees involved are directed largely towards the processing of the goods which move in interstate commerce (cf. R. 82).

2. Petitioner also urges that the "service establishment" exemption provided by Section 13 (a) (2) is applicable to its employees in the slaughtering department who, it is contended, merely "service the animal" (Pet. Br. 23). A similar contention might be made with respect to virtually every operation carried on by most manufacturers, namely, that they were merely performing services with respect to the raw materials being converted into finished products. The purpose of Section 13 (a) (2), however, was not to exempt manufacturing

[2] During the period beginning with the effective date of the Act, October 24, 1938, and ending December 31, 1940, petitioner's total revenue from the sale of hides, offal, and other byproducts was in excess of $55,000 (R. 12, 17). Between January 1, 1941, and July 31, 1941, the corresponding figure was $19,000 (*ibid.*). In terms of weight the production of byproducts totalled many thousands of pounds each month (R. 51–64). Forty-five percent of the live weight of the animals slaughtered by appellee became inedible hides and offal (R. 24).

establishments, but establishments serving the needs of ultimate consumers. *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572–573 (C. C. A. 3), affirmed, 316 U. S. 517. Obviously, slaughtering animals and dividing their carcasses into meat and byproducts "is not the equivalent of selling services to consumers." See *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 526. The court below was plainly correct in holding, on the authority of the *Kirschbaum* decision (R. 87), that the slaughtering department was not a service establishment and that the operations performed there comprised the first steps in "the processing and producing of meat products and of leather, fertilizers, soaps, and lubricants" (R. 87). See also *Fleming* v. *Arsenal Bldg. Corp.*, 125 F. (2d) 278, 280 (C. C. A. 2); *Walling v. Sondock*, 132 F. (2d) 77 (C. C. A. 5); *Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101 (C. C. A. 9).

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

IRVING J. LEVY,
Acting Solicitor,
United States Department of Labor.

MARCH 1943.

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